

## The Wisconsin Comparative Negligence Act - Suggested Amendment

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# REVIEW OF THE WISCONSIN COMPARATIVE NEGLIGENCE ACT— SUGGESTED AMENDMENT

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## I. INTRODUCTION

The Wisconsin Statute has been in force since 1931, so we have had more than twenty-five years experience with its operation in the field of negligence law. When originally enacted on June 16, 1931, (Chapter 242, Laws of 1931), it read as follows:

“Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished by the jury in the proportion to the amount of negligence attributable to the person recovering.”

The only amendment to the above statute was made on July 29, 1949, (Chapter 548, Law of 1949), by deleting therefrom the phrase “by the jury.” Accordingly, today both in jury trials and in trials to the court without jury, the damages in ordinary negligence cases can be diminished “in the proportion to the amount of negligence attributable to the person recovering” whether he be plaintiff, counter-claimant, or cross-claimant.

The legislative purpose of the Wisconsin Comparative Negligence Statute was to remove from the field of negligence law the common law defense of contributory negligence as a complete bar to recovery in ordinary negligence cases. No doubt you recall the leading common law case on contributory negligence, namely, *Butterfield v. Forrester*,<sup>1</sup> which was an action upon the case for partially obstructing a highway. The defendant, without legal authority, erected a pole across part of the highway while he was repairing his home. The plaintiff, who had emerged from a tavern, mounted his horse, dashed madly down the street and collided with the street obstruction as a result of which he was thrown from his horse and suffered injuries. At the time of the collision it was dusk, about 8 o'clock in the evening as people were just beginning to light candles, nevertheless, the obstruction was discernible from a distance of about 100 yards and could have been avoided by any one not riding so very hard. The plaintiff had the audacity, if not the arrogance, to sue in a court of law for justice. He got it. Recovery was denied, because:

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<sup>1</sup> 11 East. 60, 193 K.B. 926 (1809).

As stated by Justice Sir John Bayley,

"The plaintiff was proved to be riding as fast as his horse could go and this was through the streets of Derby. If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault," and<sup>2</sup>

As stated by Lord Chief Justice Edward Ellenborough:

"A party is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant and no want of ordinary care to avoid it on the part of the plaintiff."<sup>3</sup>

From this case, which really disclosed willful or wanton misconduct or gross negligence on the part of the plaintiff, the common law rule developed that want of ordinary care, no matter how slight on the part of the plaintiff, which contributed to his injuries, completely bars his recovery in cases of ordinary negligence. This harsh doctrine was discarded as a complete defense in England about 1945; all of Europe, Australia, New Zealand, and parts of Canada have also discarded it, as have a number of American States. The Federal Government has abandoned it in the Federal Employers' Liability Act and several other special Federal Statutes. In the author's opinion, it is only a question of time before a Comparative Negligence Act in some form or other will be enacted in every state.

## II. PERTINENT WISCONSIN JUDICIAL INTERPRETATIONS

A. *Constitutionality*: Any objection to the Wisconsin Comparative Negligence Statute on the ground that it abrogates or modifies the common law doctrine of contributory negligence and is, therefore, unconstitutional as depriving persons of property without due process of law or denying to any person equal protection of the law, is believed unavailing in view of the fact that a similar constitutional objection made about fifty years ago in respect to the Wisconsin Comparative Railroad Negligence Statute, was held untenable.<sup>4</sup>

Furthermore, the 1911 Wisconsin Workmen's Compensation Act abolishing the common law defenses of contributory negligence, fellow servant, and assumption of risk in industrial accidents arising out of or incidental to employment, successfully withstood all constitutional attack. The Wisconsin Supreme Court observed such defenses were

<sup>2</sup> *Id.* at 61.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Kiley v. Chicago, Milwaukee & St. Paul R.R. Co.*, 138 Wis. 215, 119 N.W. 309 (1909).

not entrenched by any constitutional provisions or even originally created by legislative action; they were evolved by the early eighteenth century courts to meet specific social or economic problems of their time—an agricultural age involving primarily manual labor by comparatively few fellow servants. The precedent for these defenses when once made was generally followed until it became buttressed by a multitude of decisions in practically all of the jurisdictions whose jurisprudence is founded upon the English common law. The Court properly concluded that twentieth century social, economic and judicial problems arising from Industrialism with its appalling rate of accidents to many fellow workmen in the use of new and complex machines should not be viewed and solved by an eighteenth century judicial mind in the light of eighteenth century conditions and ideals.<sup>5</sup>

B. *Retroactivity*: The Wisconsin Comparative Negligence Act is not retroactive. So, when an automobile accident occurred before the enactment of said Act, but the action was commenced subsequent thereto, the plaintiff could not recover where she was found guilty of contributory negligence as a matter of law.<sup>6</sup>

C. *Court's Review of Jury's Percentages of Negligence*: Even where the court can find as a matter of law that the plaintiff is guilty of contributory negligence, it will almost always let the jury determine the percentages of negligence. Thus, in the first case involving the Wisconsin Comparative Negligence Law, two automobiles collided at an intersection and the jury found the driver of one alone negligent of causing the accident, and upon appeal the Wisconsin Supreme Court, as a matter of law, found the other driver negligent, it refused to determine the percentages of negligence, stating:<sup>7</sup>

"The defendant strenuously urged that the negligence of the plaintiff was as great as the negligence of the defendant and that, if such be the case, the plaintiff may not recover under the Comparative Negligence Law [*Sec. 331.045 Wis. Stats.*]. While it is entirely within the province of the Court to say under the facts in this case the plaintiff was guilty of contributory negligence as a matter of law, it is quite another matter for the Court to say that the negligence of the plaintiff was as great as that of the defendant. When two persons are negligent and injury to one proximately results from the combined negligence of both, it must often be a very delicate and difficult question to decide whether the negligence of one was greater than that of the other and contributed in a greater degree to produce the injury. There is no yardstick with which to measure the two acts of negligence, nor scales with which to weigh them."

<sup>5</sup> *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N.W. 209 (1911); *Besnys v. Zohrland Leather Co.*, 157 Wis. 203, 147 N.W. 37 (1914); *Puza v. C. Hennecke Co.*, 158 Wis. 482, 149 N.W. 223 (1914).

<sup>6</sup> *Brewster v. Ludtke*, 211 Wis. 344, 247 N.W. 449 (1933).

<sup>7</sup> *Brown v. Haertel*, 210 Wis. 345, at 350, 244 N.W. 630, at 632 (1932).

In the next case, *McGuigan v. Hiller Brothers*,<sup>8</sup> the evidence showed plaintiff was injured in an automobile accident which occurred on June 25, 1931, nine days after the passage of the Wisconsin Comparative Negligence Statute. The Wisconsin Supreme Court refused to decide as a matter of law that the negligence of the plaintiff in operating his car on the wrong side of the highway was greater than that of the defendant in operating his car without clearance lights, in direct violation of statute, stating:

"If the negligence of each existed simply in a failure to look and they both had ample opportunity to discover each other, it might be their negligence would have to be equal. However, it is evident that the instances in which a Court can say, as a matter of law, that the negligence of the plaintiff is equal to or greater than that of the defendant, will be extremely rare and would ordinarily be limited to cases where the negligence of each is precisely of the same kind and character."<sup>9</sup>

When percentages of negligence are found by the jury, the Wisconsin Supreme Court upon review observed that mathematical accuracy is impossible of attainment. Thus, in *Horn v. Snow White Laundry*,<sup>10</sup> the Court stated:

"We cannot hold juries to the use of calipers to evaluate ratios precisely. We must accept rough generalizations rather than fine distinctions."

In the recent case of *Bell v. Duessing* the Court observed that it may not adopt a rule of thumb that will check off automatically look-out against lookout, control against control, etc., holding these items equal as a matter of law in every case, but that apportionment is almost always for the jury.

*D. Legal Effect of Jury's Verdict on Percentages of Negligence:* After a verdict is returned, the serious question arises under the Comparative Negligence Statute as to the legal effect of the percentages of negligence found by the jury. Where both car drivers in an automobile negligence action seek recovery for damages suffered, and both are found negligent, may the one found guilty of the lesser negligence recover his damages diminished in such a ratio as his negligence bears to the negligence of the other driver? For example, if one driver suffering \$60,000 damages is found 25% negligent and the other driver 75% negligent, does the first driver recover \$40,000 (his full damages diminished by one-third thereof, based upon the ratio of 25% negligence to 75%), or, does he recover \$45,000 (his damages diminished by one-fourth, which is based upon the ratio of 25% to 100%, the total negligence of both parties)?

<sup>8</sup> 209 Wis. 402, 245 N.W. 97 (1932).

<sup>9</sup> *Id.* at 407.

<sup>10</sup> 240 Wis. 312, at 319, 3 N.W. 2d 380, at 383 (1942).

<sup>11</sup> 275 Wis. 47, 80 N.W. 2d 821 (1957).

The Wisconsin Supreme Court first held in *Paluczak v. Jones*,<sup>12</sup> that the damages of the party found less negligent must be reduced in such ratio as the percentage of his negligence bears to the percentage of negligence found in the other party. Three months later it reversed itself and held in *Cameron v. Union Automobile Insurance Co.*,<sup>13</sup> that the negligence of one who is less at fault must be reduced in ratio or proportion to the percentage of his negligence as it bears to 100%, the total negligence of both parties and not in such ratio as the percentage of his negligence bears to the percentage of negligence of the other party.

Another serious question that arose early after the passage of the Wisconsin Comparative Negligence Act, was whether the percentages of negligence of all the defendants in a multiple party action should be added and the sum so obtained compared with the percentage of negligence found in the plaintiff to determine whether the negligence of the plaintiff was as great as the total negligence of all the defendants against whom recovery was sought. Or, should the percentage of negligence found in each defendant be compared separately with the percentage of negligence found in the plaintiff? Thus, under the aggregate comparative negligence theory, if plaintiff's damages are \$60,000, and the percentage of negligence found in him is 25% and in one defendant is 20% and in another defendant 55%, the plaintiff would recover a judgment against both defendants, jointly and severally, for his entire damages less 25%, or \$45,000. Under the separate comparative negligence theory, the percentage of negligence (25%) of the plaintiff is greater than the percentage of negligence (20%) found in one defendant, but less than the percentage of negligence (55%) found in the other defendant, therefore, the plaintiff would not recover judgment against the defendant guilty of 20% negligence, but would recover a judgment only against the defendant guilty of 55% negligence for his entire damages less 25%, or \$45,000. If the percentage of the plaintiff's negligence had been 45% and that of one of the defendants 25% and that of the other defendant 30%, plaintiff's net recover under the aggregate comparative negligence theory would be \$27,000 (his full damages of \$60,000 less 45%), but under the separate comparative negligence theory, he would recover nothing from either of the defendants because the percentage of plaintiff's negligence (45%) was greater than the percentage of negligence of each defendant considered separately rather than jointly.

The Wisconsin Supreme Court in *Walter v. Kroger Grocery & Baking Company*,<sup>14</sup> determined to accept the separate comparative negligence theory, stating:

<sup>12</sup> 209 Wis. 640, 245 N.W. 655 (1932).

<sup>13</sup> 210 Wis. 659, 246 N.W. 420 (1933).

<sup>14</sup> 214 Wis. 519, at 536, 252 N.W. 721, at 727 (1934).

"Now by virtue of *Sec. 331.045 Wis. Stats.* the instances in which there is a right to recover have been increased in that, even though there was contributory negligence, recovery is not barred if such negligence was not as great as the negligence of the person against whom recovery is sought. If such contributory negligence was as great as the negligence of one of the tort-feasors against whom recovery is sought, then as to that particular tort-feasor there still is no right to recover. That tort-feasor is out of the picture as far as liability on his part to the party whose negligence was as great as his is concerned. On the other hand, from every remaining tort-feasor, whose negligence was greater than that of the person seeking to recover, there exists now, by virtue of the statute, a right to recover, subject, however, to the limitation prescribed by the statute, that the damages allowed shall be diminished in proportion to the negligence attributable to the person recovering."

*E. Gross Negligence as Affected by the Comparative Negligence Act:* The Wisconsin Supreme Court has recognized three degrees of negligence: slight, ordinary, and gross.

Slight Negligence is the failure to exercise that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use.<sup>15</sup> It has the element of inadvertence, but the damages resulting from failure to abstain therefrom are *damnum absque injuria*, and the party injured, though contributing in a remote degree to his injury, is not precluded from obtaining judicial redress.<sup>16</sup> This doctrine of slight negligence remains unaffected by the Wisconsin Comparative Negligence Act.

Ordinary Negligence is often defined as the failure to exercise such care as the great mass of mankind or its type, an ordinarily prudent man, would exercise under the same or similar circumstances; it has no sub-degrees such as slight, medium or great.<sup>17</sup> Plaintiff's want of ordinary care, no matter how slight, which contributed to his injuries, barred his recovery at common law and also formerly in Wisconsin except when the defendant was found guilty of willful or wanton misconduct, loosely called Gross Negligence.<sup>18</sup>

The Wisconsin Comparative Negligence Act very definitely alters the common law rule of contributory negligence by permitting recovery even if the claimant is found guilty of a want of ordinary care, which contributed to his injuries, provided his causal negligence was not as great as the negligence of the person against whom recovery is sought, and, provided further, any damages recoverable must be

<sup>15</sup> *Guffen v. Town of Willow*, 43 Wis. 509 (1878).

<sup>16</sup> *Asten v. Chicago, M. & St. P.R.R. Co.*, 143 Wis. 477, 128 N.W. 265 (1910).

<sup>17</sup> *Ibid.*

<sup>18</sup> *Randall v. Northwestern Telephone Co.*, 54 Wis. 140, 11 N.W. 419 (1882); *Balin v. Chicago, St. P. M. & O. Rr. Co.*, 108 Wis. 333, 54 N.W. 446 (1900); *Tomasik v. Lanferman*, 206 Wis. 94, 238 N.W. 857 (1931); *Watermelon v. Fox River Electric & Power Co.*, 110 Wis. 153, 85 N.W. 663 (1901).

diminished in proportion to the amount of negligence attributable to the claimant.

Gross Negligence is a wrong resulting from a wilful intent to injure, or such reckless and wanton disregard of the rights and safety of another of his property and a willingness to inflict injury, from which the law deduces an intent to injure.<sup>19</sup> In 1910, the Wisconsin Supreme Court stated that Gross Negligence "... has for its name somewhat of a misnomer, in that the fault is not characterized by inadvertence, in the lexical sense, at all."<sup>20</sup>

That the Wisconsin Comparative Negligence Act did not change the gross negligence rule, permitting a plaintiff to recover his entire damages without diminution, where he is guilty of only ordinary causal negligence and the defendant is guilty of gross negligence, was clearly indicated by the Wisconsin Supreme Court in 1938, in the case of *Wedel v. Klein*,<sup>21</sup> wherein it stated:

"The defendant, Hardware Mutual Casualty Company, contends that the doctrine of gross negligence in negligence cases was promulgated originally by the courts in order that the rigorous rules regarding the effect of contributory negligence might be circumvented; that in a state like Wisconsin where the comparative negligence doctrine exists, there can be no good reason for adhering to the gross negligence doctrine, and that therefore our law in respect to gross negligence should be reconsidered and restated . . . . We deem the contentions, and the discussions in support of them, very interesting but not sufficiently convincing to move us at this time to reconsider and abolish our rule with respect to gross negligence . . . ."

F. *Imputed Negligence as Affected by the Comparative Negligence Act*: The common law rule of imputed negligence has not been changed by, but is subject to the Wisconsin Comparative Negligence Act, which may require at times the adding of the percentage of negligence of one claimant to that of another claimant and comparing such combined percentages of negligence as a unit with the negligence of the person or persons against who recovery is sought. Thus,

1. In *Western Casualty & Surety Co. v. Dairyland Mutual Insurance Co.*,<sup>22</sup> the liability insurer of *A*, the driver of a car which struck a stalled car that had skidded to the wrong side of the highway on a wintry night, made a settlement for the resulting death of *B*, an occupant and joint owner of the stalled car, which had been driven by the other joint owner *C*, the wife of *B*. The liability insurer of *A* then sued for contribution from *D*, the driver of a third car, which had

<sup>19</sup> *Willard v. Chicago Northwestern R.R. Co.*, 150 Wis. 234, 136 N.W. 646 (1912); *Benston v. Brown*, 186 Wis. 629, 203 N.W. 380 (1925).

<sup>20</sup> *Asten v. Chicago M. St. P. R.R. Co.*, 143 Wis. 477, 128 N.W. 265 (1910).

<sup>21</sup> 229 Wis. 419, at 425, 282 N.W. 606, at 609 (1938).

<sup>22</sup> 273 Wis. 349, 77 N.W. 2d 599 (1956).



been stopped without dimmed headlights opposite the stalled car. The Wisconsin Supreme Court held that under the Wisconsin Comparative Negligence Act the negligence of *C*, the driver of the stalled car, in failing to make a prompt effort to summon help to remove it, must be added to the negligence of *B*, her deceased husband, who remained seated for an unreasonable length of time in the stalled car dangerously located on the wrong side of the highway, and such combined negligence must be compared with the negligence of *D*, the operator of the third car which had been stopped with blinding headlights opposite the stalled car; this comparison of negligence was necessary because any right of contribution on the part of the liability insurer of *A* arose out of the cause of action of *C*, the driver of the stalled car, for her husband's wrongful death, and hence the combined causal negligence of her deceased husband and her own negligence as beneficiary of such cause of action must be compared with the negligence of the person from whom recovery was sought.

2. In *Reber v. Hanson*<sup>23</sup> a minor child was killed by *A*'s truck while playing in the driveway of a cheese factory operated by its parents, *B* and *C*, who sued for wrongful death of their child. The jury found *A* was 25% causally negligent and the parents, *B* and *C*, 75% causally negligent, and, accordingly, judgment was rendered in favor of the defendant. On appeal the plaintiffs argued it was improper to combine their negligence and compare the sum thereof, 75%, with the 25% causal negligence of defendant *A*, but that their negligence, if any, was divisible and should have been found separately. The Supreme Court held the duty of parents to protect their child is a joint duty of the parents and is not divisible, and their combined causal negligence must be considered as a unit, stating:

" . . . let us suppose an extreme case: Two parents sit idly on their porch and watch their small child wander into the street where it is hit by an automobile. The jury finds the driver 40% causally negligent and the parents 60%. Since the negligence of each parent is exactly the same as that of the other in this hypothetical case it might be argued that the 60% of their combined negligence is composed of 30% negligence of each and, accordingly, each parent, having less causal negligence than the driver, would recover damages from him. We do not think this is or should be the law. We hold that the duty of parents to protect their child is the duty of both parents and it is not divisible so that either parent has half a duty (or some other fraction) for the breach of which he or she may be penalized, to that extent but no more, under the Comparative Negligence Statute."

3. The last case should be distinguished from an earlier case, *Hansberry v. Dunn*<sup>24</sup> where parents sued for the wrongful death of their

<sup>23</sup> 260 Wis. 632, at 637, 51 N.W. 2d 505, at 507 (1952).

<sup>24</sup> 230 Wis. 626, 284 N.W. 556 (1939).

infant daughter and were awarded \$2500 damages, and it was claimed that the mother was the agent of the father in driving the automobile in which the infant daughter was a passenger at the time of the collision and that her negligence was imputable to him, or that at least his recovery for the death of his infant daughter should be diminished by 45%, the percentage of negligence found in the mother (host-driver). It was held that the evidence disclosed the mother made the automobile trip not in a jointly owned car for a joint purpose but in the father's car for her own purpose of visiting her sister so that the negligence of the mother could not be imputed to the father; also since the Wrongful Death Statute created in certain specified beneficiaries a cause of action for death by wrongful act the negligence of the beneficiary must be compared with that of the tort-feasor and his recovery diminished or defeated in accordance with the result of that comparison. In this case there were two beneficiaries, one of whom was subject to no defense and the other subject to having any recovery to which she might be entitled diminished by the percentage of her negligence. Accordingly, the father was entitled to receive \$1,250 or one-half of the recovery for wrongful death and the mother was entitled to receive \$1,250 diminished by 45%, the percentage of her negligence, or \$562.50, leaving her a net recovery of \$687.50. It is to be observed that in this case the father, the sole owner of the automobile in which their infant daughter was killed, did not participate in the automobile trip and was held not negligent in permitting the mother to take the infant daughter on the automobile trip. Therefore, the failure to perform the parental duty of protection was chargeable solely to the mother whose negligence contributed to the death of her infant daughter.

4. In *Johnson v. Pierce*<sup>25</sup> where a mother and her son, making a journey from Superior, Wisconsin, to Biloxi, Mississippi, in their jointly owned automobile to bring a second son from his Army Post to his home, had mutually agreed on the journey and in the manner of carrying it out they were held engaged in a joint adventure involving a mutual agency so that when the son, driving the car, met with an automobile collision his casual negligence of 45% was imputed to the mother and added to her 10% causal negligence, thereby defeating her action for personal injuries against the driver of the other car, who was found guilty of only 45% negligence.

G. *Assumption of Risk as Affected by the Comparative Negligence Act*: Under the common law the defense of assumption of risk and the defense of contributory negligence, although different and distinct defenses, were complete bars to recovery in an action based on ordinary negligence. Not so now, in respect to the defense of contributory negli-

<sup>25</sup> 262 Wis. 367, 55 N.W. 2d 394 (1952).

gence under the Wisconsin Comparative Negligence Statute. Assumption of risk is based upon consent, due care or lack of it is immaterial; contributory negligence is based upon fault, actual or imputed. Assumption of risk is still a complete bar to recovery in a negligence action by a guest against his host-driver. If the plaintiff-guest also sues the driver of another car for negligence, the defense of contributory negligence but not assumption of risk is available to such defendant-driver; "... the assumption of risk may be under such circumstances that the plaintiff would be guilty of contributory negligence in so assuming but it is then the plaintiff's contributory negligence, not the plaintiff's assumption of risk of host's negligence."<sup>26</sup> The defense of contributory negligence, actual or imputed, even if available to the driver of another car, is not a complete bar to recovery under the Wisconsin Comparative Negligence Statute unless the contributory negligence of the plaintiff equals or exceeds the ordinary causal negligence of such defendant-driver. Thus:

1. In *Archer v. Chicago, Milwaukee, St. Paul R. R. Co.*,<sup>27</sup> joint owners of a car (husband and wife) were on a social trip (visiting their married daughter) in which they were jointly interested, it was held they were engaged in a joint enterprise so that when the car being driven by the husband collided with an unlighted railroad box car, the negligence of the husband was imputed to the wife in her claim against the defendant railroad, but this negligence did not deprive the wife of her right to recover against her husband for personal injuries where there was no finding that she had assumed the risk or was guilty of any personal negligence.

2. But, in *Johnsen v. Pierce*,<sup>28</sup> a mother jointly owned the automobile with her son, and while making a journey with him for their joint interest, had a collision with another car while the son was driving and the mother sued the defendant-driver of the other car who interpleaded the son and his liability insurance carrier, who in turn claimed the defense of assumption of risk; it was held the mother could recover from neither of the defendants because:

(1) The defendant-driver of the other car was found guilty of 45% causal negligence, and the son was found guilty of 45% casual negligence, which was imputable to the mother, who was individually found 10% negligent, making their combined negligence 55%; and (2) the jury finding that the mother had assumed the risk of her son's negligent driving deprived her of any right of recovery against her son and his liability insurance carrier.

<sup>26</sup> *Veverka v. Metropolitan Casualty Insurance Co.*, 2 Wis. 2d 8, at 12, 85 N.W. 2d 782, at 784 (1957).

<sup>27</sup> 215 Wis. 509, 255 N.W. 67 (1934).

<sup>28</sup> 262 Wis. 367, 55 N.W. 2d 394 (1952).

H. *Contribution Between Joint Tort-feasors as Affected by the Comparative Negligence Act*: At common law there could be contribution between joint tort-feasors where there was no wilful or conscious wrong. Wisconsin adopted this common principle<sup>29</sup> prior to the passage of the Wisconsin Comparative Negligence Act in 1931. However, contribution between joint tort-feasors is allowed on an equal basis regardless of the percentages of negligence found in the joint tort-feasors, provided there is payment in discharge of a common liability arising from ordinary negligence, not gross negligence. The rule of contribution based upon equal proportion appears to have been originally founded upon the seeming difficulty of determining the degree of negligence in each joint tort-feasor. It was *judicium rusticum*, a sort of rough and ready rustic justice applied to the Law of Negligence. No serious effort was made in Wisconsin to change the contribution rule of equal proportion until 1938, when the Supreme Court declined to make the change, stating:<sup>30</sup>

"The defendant contends that the law of contribution between joint tort-feasors as it now exists in this state should be reconsidered, and that it should now be held that contribution between tort-feasors should be based upon a comparison of the degrees of their fault, expressed in percentages, rather than fifty-fifty basis, which is our present rule regardless of the degrees of fault, *Brown vs. Haertel*, (1932), 210 Wis. 354, 244 N.W. 633, 246 N.W. 691. We deem the contentions and discussions in support of them very interesting but not sufficiently convincing to move us at this time to reconsider and abolish our rule . . . with respect to contribution between tort-feasors."

Consequently, we have in Wisconsin the inconsistency in the law of negligence of determining the plaintiff's and counter-claimant's right of recovery on the basis of percentages of ordinary causal negligence under the Comparative Negligence Statute and the cross-complainant's right to recovery of contribution from joint tort-feasors having a common liability for ordinary negligence on the basis of equal proportion, regardless of the percentages of negligence found in the individual joint-tort-feasor. A few examples are as follows:

1. In *Brown v. Haertel*,<sup>31</sup> an action for negligence was brought by plaintiffs (automobile guests) against the defendant-driver of another car without joining the host as a defendant. Upon motion of the defendant-driver of the other car, the host was interpleaded as a defendant and cross-complaint or contribution was filed. The plaintiffs were exonerated on contributory negligence and had judgment against the defendant-driver of the other car; since plaintiffs sought no judg-

<sup>29</sup> *Ellis v. Chicago Northwestern R.R. Co.*, 167 Wis. 392, 89 N.W. 538 (1918).

<sup>30</sup> *Wedel v. Klein*, 229 Wis. 419, at 425, 282 N.W. 606, at 609 (1938).

<sup>31</sup> 210 Wis. 354, 244 N.W. 633, 246 N.W. 691 (1932).

ment against the impleaded defendant-host, none was entered. However, since the defendant-driver of the other car had cross-complained against the impleaded host for contribution and the impleaded host had been found guilty of negligence as a matter of law, the right to contribution arose and was not defeated by the plaintiff's failure to seek judgment against the defendant-host-driver. The Wisconsin Supreme Court granting contribution under the rule of equal proportion observed:

" . . . the Comparative Negligence Statute does not operate until there has been a finding of contributory negligence. If there be no contributory negligence in the case, the statute has no application. It was not enacted for the purpose of measuring the liability of joint tort-feasors as between themselves."<sup>32</sup>

2. In *Walker v. Kroger Grocery & Baking Co.*,<sup>33</sup> it was held the defendant-host-driver of an automobile, even if guilty of concurring negligence with the co-defendant-driver of another car, was not liable for such negligence to his plaintiff-guest because of a finding of assumption of risk by said guest; consequently, the Comparative Negligence Statute was not applicable and the defendant-host-driver was not liable for contribution because there was no joint liability arising out of a common obligation with others negligently causing plaintiff's injuries.

3. In *Western Casualty & Surety Co. v. Dairyland Mutual Insurance Co.*,<sup>34</sup> where the actual and imputed negligence of the plaintiff was as a matter of law equal to the negligence of *A*, one of the defendants, *B*, a co-defendant, settling with and paying to the plaintiff for damages, could not have contribution against defendant *A*, because under the Comparative Negligence Act the plaintiff could not recover against the defendant *A*, whose negligence was not greater than that of the plaintiff; therefore, defendant *B* did not discharge a joint liability arising out of a common obligation with the defendant *A*.

4. In *Zurn v. Whatley*,<sup>35</sup> it was held that the interpleaded defendant-host-driver, guilty of ordinary negligence causing injury to his plaintiff-guest, was not liable for contribution toward the co-defendant, driver of the other car, who was found guilty of gross negligence, a wilful or wanton misconduct, for which contribution, based upon equity and justice, does not lie.

### III. SOME ADMINISTRATIVE PROBLEMS ARISING FROM THE COMPARATIVE NEGLIGENCE ACT.

#### *A. Pleading Problems:*

1. Since the Wisconsin Comparative Negligence Act is not appli-

<sup>32</sup> *Id.* at 359, 246 N.W. at 692 (1932).

<sup>33</sup> 214 Wis. 519, 252 N.W. 721 (1934).

<sup>34</sup> 273 Wis. 349, 77 N.W. 2d 599 (1956).

<sup>35</sup> 213 Wis. 365, 251 N.W. 435 (1933).

cable unless there is a finding of contributory negligence,<sup>36</sup> it is important to raise and litigate the issue of contributory negligence so that the court or jury may be required to find the separate percentages of negligence of the parties. It is not necessary for the plaintiff to plead specially freedom from ordinary contributory negligence, nor is it necessary for the defendant to plead specially plaintiff's ordinary contributory negligence because by the very nature of a negligence case the plaintiff's due care is put in issue by a general or specific denial.<sup>37</sup>

2. However, gross negligence must be specially pleaded. A complaint which characterized the conduct of the driver of an automobile merely as reckless, negligent, and unlawful, but contained no language charging the conduct complained of as wilful, wanton, or intentional, does not aver, raise, or permit litigation of an issue of gross negligence.<sup>38</sup> The proper pleading of gross negligence is extremely important because under the Wisconsin Comparative Negligence Act a finding of gross negligence against a defendant tort-feasor does not require any diminution in damages awarded plaintiff by reason of his contributory negligence. Also, a finding of gross negligence on the part of a defendant tort-feasor deprives him of the right of contribution from his co-defendant tort-feasor.

3. Assumption of risk is an affirmative defense that must be specially pleaded and, accordingly, questions in the special verdict on assumption of risk may not be submitted to the jury when not so pleaded.<sup>39</sup>

The importance of specially pleading assumption of risk is particularly grave in an action by a guest against his host-driver and the driver of another car because of concurring negligence; the host would not be as interested in the partial defense of contributory negligence resulting possibly in a mere diminution of plaintiff's damages under the Comparative Negligence Statute as he would be interested in the complete defense of assumption of risk to the plaintiff's cause of action for negligence and to a defendant's cross-complaint seeking contribution.<sup>40</sup>

#### *B. Court Instruction Problems:*

As every trial lawyer knows instructions to the jury relating to the burden of proof are very important. The Comparative Negligence Act requires the negligence of all parties to be carefully weighed and compared to determine whether the negligence of the person seeking

<sup>36</sup> *Brown v. Haertel*, 210 Wis. 345, 244 N.W. 630 (1932).

<sup>37</sup> *Harper v. Holcomb*, 146 Wis. 184, 130 N.W. 1128 (1911); *Arneson v. Buggs*, 231 Wis. 499, 286 N.W. 19 (1939).

<sup>38</sup> *Bentson v. Brown*, 186 Wis. 629, 203 N.W. 380 (1925).

<sup>39</sup> *Catura v. Romanofsky*, 268 Wis. 11, 66 N.W. 2d 693 (1954).

<sup>40</sup> See *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934); *Scory v. LaFave*, 215 Wis. 21, 254 N.W. 643 (1934).

recovery was as great as the negligence of the person against whom recovery is sought.

1. In *Gauthier v. Carbonneau*,<sup>41</sup> a two party negligent action, it was held that, under the Comparative Negligence Statute, an instruction to the jury on determining the causal negligence attributable to each party, that plaintiff had the burden of proof as to the percentage of causal negligence attributable to the defendant, and the defendant had the burden of proof as to the percentage of causal negligence attributable to the plaintiff, was proper.

2. In *Saxby v. Cadigen*,<sup>42</sup> a multiple party action, the Court approved an instruction to the effect that the burden of proof that the defendant-host-driver failed to exercise his driving skill and judgment was upon the plaintiff-guest and the defendant-driver of the other car seeking contribution from the defendant-host-driver. The Court stated the rationale as follows:

"The host-driver starts with the presumption that he is exercising the skill and judgment which he possesses in the management of his automobile and this presumption must be overcome by his guest before the guest can recover. The defendant, Cadigen (driver of the other car) would be entitled to contribution only in case there was joint liability on the part of both drivers to the plaintiff. She is bound by the law as to the duty a host owes to his guest. If she could establish that Klokow (the host-driver) failed to exercise the skill and judgment he possessed in the management and control of his automobile, then she would have a cause of action for contribution against him in case she and Klokow were found to be responsible for the guest's injuries."

3. Since a guest who fails to protest will be considered to have acquiesced in any course of negligent driving that has persisted long enough to give him an opportunity to protest,<sup>43</sup> the burden of proof is upon the plaintiff-guest to show that the defendant-host failed to exercise his duty and was, therefore, causally negligent; if the plaintiff guest meets this burden of proof as to causal negligence of the host-driver, he is still confronted with the burden of proving that the found causal negligence of the defendant-host-driver did not persist long enough to give him a reasonable opportunity to protest. Instructions on these burdens of proof have often proven complex and difficult but they exist even in the absence of a Comparative Negligence Statute.

4. Long before the Wisconsin Comparative Negligence Statute was enacted in 1931, it was a settled rule that a jury should not be instructed as to the effect of their answers to questions in a special

<sup>41</sup> 226 Wis. 527, 277 N.W. 135 (1938).

<sup>42</sup> 266 Wis. 391, at 395, 63 N.W. 2d 820, at 822 (1954).

<sup>43</sup> *Groh v. W. O. Krahn, Inc.*, 223 Wis. 662, 271 N.W. 374 (1937).

verdict, and if they were expressly or impliedly so instructed, it was generally held to be prejudicial error. A few years after the passage of the Wisconsin Comparative Negligence Statute, a Trial Court, during its instruction to the jury, read the Comparative Negligence Act; upon appeal this was held erroneous and Wisconsin trial courts were admonished to avoid telling the jury the effect of their answers by reading the Comparative Negligence Statute to them.<sup>44</sup>

### C. Verdict Problems:

In Wisconsin we have both a general verdict and a special verdict. The general verdict places the responsibility upon the jury to find the facts and apply the law. The purpose of the special verdict is to limit the jury to fact finding and leave to the Trial Judge the duty of applying the law.<sup>45</sup> In a typical negligence action containing a complaint and a counterclaim and involving drivers of two colliding automobiles subject to the Comparative Negligence Statute, the special verdict normally consists of seven questions, the first two relating to the defendant's negligence and its causation, the third and fourth questions to the contributory negligence of the plaintiff and its causation, question five to the comparative negligence of the parties, calling for percentages, and the last two questions to the damages of the parties. Several of the questions have sub-parts; each act of negligence in issue is separately listed under the questions relating to negligence and causation. A typical form of comparative negligence questions in a special verdict is as follows:

"If in your previous answers to questions in this special verdict you found that both the defendant, John J. Jones, and the plaintiff, Richard P. Roe, were negligent and that such negligence was an efficient cause of the accident, then answer this question:

"Assuming the total negligence that caused the collision to be 100% what proportion of such negligence is attributable:

- |     |                   |       |    |
|-----|-------------------|-------|----|
| (a) | To John J. Jones  | _____ | %  |
| (b) | To Richard P. Roe | _____ | %  |
|     | Dissenting        | _____ | ." |

1. In the early case of *Honore v. Ludwig*,<sup>46</sup> decided shortly after the passage of the Comparative Negligence Act, the trial court submitted to the jury a special verdict in an automobile negligence case and jury findings were made of negligence against each of the parties with a general finding containing no percentages of negligence, but simply finding that the negligence of the defendant was greater than the negligence of the plaintiff, and a specific finding that plaintiff's damage as diminished in proportion to the amount of negligence at-

<sup>44</sup> De Groot v. Van Akkern, 225 Wis. 105, 273 N.W. 725 (1937).

<sup>45</sup> Byington v. Merrill, 112 Wis. 211, 88 N.W. 26 (1901).

<sup>46</sup> 211 Wis. 354, 247 N.W. 335 (1933).



tributable to her was a stated sum. The Wisconsin Supreme Court let the verdict stand, although the jury had not been required to find the full damages sustained by the parties, or the percentages of negligence, and it could not be ascertained that the damages awarded the plaintiff were properly diminished in proportion to the negligence attributable to the plaintiff.

2. However, in later decisions, *Schumacher v. Wolf*,<sup>47</sup> and *Catura v. Romanofsky*,<sup>48</sup> the Wisconsin Supreme Court held that a special verdict under the Comparative Negligence Statute, containing omnibus questions as to assumption of risk or the negligence of the parties, is defective because it is extremely important to have specific jury findings as to every set of ultimate facts on which assumption of risk or causal negligence is predicated, such as lookout, speed, management and control, etc., in order for the jury to compare the negligence of the parties and for the Court to rule upon the jury's determination in case of motions after verdict.

3. In construing the Wisconsin Comparative Negligence Act, the Supreme Court has held<sup>49</sup> that when a comparison of negligence is made and the same is expressed in percentages, the total aggregate negligence must always equal 100%. Accordingly, where assumption of risk was not put in issue and the evidence was sufficient to sustain the jury's finding of causal negligence of 10% against the plaintiff-guest and 80% against the defendant-host-driver, but the evidence did not, as a matter of law, sustain a finding of 10% causal negligence against the defendant-driver of the other car involved in the accident, a new comparison of negligence must be had between the plaintiff-guest and the defendant-host upon retrial.

4. In Wisconsin a verdict agreed to by five-sixths of the jury is permissible.<sup>50</sup> But, in *Scipior v. Shea*,<sup>51</sup> it was held that in a negligence action under the Wisconsin Comparative Negligence Statute the same ten jurors must agree on every question it is necessary for them to consider in answering the question of comparative negligence; the same ten jurors must agree as to items of causal negligence found and the comparative effect of the causal negligence of the parties in producing the resulting damages.

5. Also, where the finding of a jury in the special verdict on the question of comparative negligence is inconsistent with one or more of its other answers, special problems have arisen. Thus, in *Statz v. Pohl*,<sup>52</sup> where the jury found that the driver of an automobile was

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<sup>47</sup> 247 Wis. 607, 20 N.W. 2d 579 (1945).

<sup>48</sup> 268 Wis. 11, 66 N.W. 2d 693 (1954).

<sup>49</sup> *Callan v. Wick*, 269 Wis. 688, 68 N.W. 2d 438 (1955).

<sup>50</sup> Wis. STATS. §270.25 (1955).

<sup>51</sup> 252 Wis. 185, 31 N.W. 2d 199 (1948).

<sup>52</sup> 266 Wis. 23, 62 N.W. 2d 556 (1954).

negligent only as to control and that such negligence was not an efficient cause of the accident but nevertheless found that such driver's negligence contributed to the cause of the accident to the extent of 20%, it was held that the verdict was inconsistent, the jury finding of 20% negligence could not be stricken as surplusage by the Court, but a new trial was necessary. The Court in the above case established, (and in the later case of *Veverka v. Metropolitan Casualty Insurance Co.*<sup>53</sup> confirmed) the following rules for guidance of the profession in determining whether findings of a verdict are inconsistent:

"1. If the issue of causal negligence is for the jury and the party inquired about is exonerated but the jury in its comparison of negligence erroneously attributes to such party some degree of causal negligence, the verdict is inconsistent, and a new trial must be granted;

"2. If it be determined that the party inquired about is free from causal negligence as a matter of law and the jury has exonerated him but has also attributed to him some degree of causal negligence, then the Court should strike the answer to the question on comparison as surplusage and grant judgment accordingly;

"3. If but one element of negligence is submitted to the jury and the Court can find as a matter of law that the party inquired about in the question is guilty of causal negligence and the jury finds that he is not, and in answer to the question on comparative negligence attributes to him some degree of causal negligence, the Court should change the answer to the question which inquires as to his conduct from 'No' to 'Yes' and permit the jury's comparison to stand with judgment accordingly."<sup>54</sup>

6. Care must also be exercised in drafting a special verdict under the Comparative Negligence Act when either ordinary negligence or gross negligence is involved. For a Trial Court to permit the jury to find a party guilty of both ordinary and gross negligence rather than in the alternative has been held to render the verdict fatally inconsistent.<sup>55</sup>

7. That the danger of quotient verdicts has been increased by the adoption of the Comparative Negligence Statute has been recognized. But, the rule has not been changed that testimony of jurors cannot be received to impeach their verdict even though it may show that each juror had set down the figure expressing his opinion of the percentage of plaintiff's negligence, divided the aggregate by twelve and took the quotient as a percentage of negligence attributable to the plaintiff and allotted the remaining percentage of negligence to the defendant. The Court stated in *Jachowska-Peterson v. D. Reik & Son*:<sup>56</sup>

<sup>53</sup> 2 Wis. 2d 83, \_\_\_\_ N.W. 2d \_\_\_\_ (1957).

<sup>54</sup> 266 Wis. at 29, 62 N.W. 2d at 559.

<sup>55</sup> *Wedel v. Klein*, 229 Wis. 419, 282 N.W. 606 (1938).

<sup>56</sup> 240 Wis. 197, at 199, 2 N.W. 2d 873, at 874 (1942).

"True, the Comparative Negligence Statute doubles the opportunities for adopting a quotient verdict for while formerly only damages might be so fixed, now comparative negligence may also be so fixed. But, if the reason for the rule (not permitting jurors to impeach their verdict) is valid, its validity is not effected by the possibility of the practice being more frequently used."

#### IV. CONCLUSIONS AND RECOMMENDATIONS

1. *There is a current need for modification of the Common Law Doctrine of Contributory Negligence.* The modification of the harsh common law doctrine of contributory negligence as a complete bar to recovery is a distinct advance toward the attainment of more nearly perfect justice. No evidence has been found that the Common Law Doctrine of Contributory Negligence acts as a deterrent to negligent conduct. We have long since passed the 1809 horse-riding days when that Common Law Doctrine was first established. Our population has increased tremendously causing increased automobile traffic congestion in the city streets and on the country highways; our high-powered mechanical means of speedy transportation across the country on throughways, turnpikes, freeways, and other highways, has enormously multiplied the occasions for accident and the opportunities for inadvertence. To now hold a claimant found guilty of as little as 1% contributory negligence is completely barred from recovery of any damages whatsoever against the wrongdoer found guilty of as high as 99% negligence, is, to say the least, extremely harsh and entirely unnecessary.

Furthermore, the Common Law Doctrine of Contributory Negligence does not conform to the average American's idea of justice and fair play. Why should one found guilty of causal negligence resulting in damages to the person and property of another seek to escape all legal liability by establishing only a slight percentage of ordinary causal negligence on the part of the person seeking recovery? When contributory negligence is not an absolute bar to recovery the person charged with negligent conduct cannot as readily deny complete liability for some reparation for his wrong. He and his insurer will, therefore, be more inclined to listen to reasonable offers for an early settlement, thereby possibly lessening litigation, relieving case congestion of Court Dockets and granting the injured party, his family, and other dependent upon him, financial relief at a time when he needs it the most.

It can also be safely said that the Comparative Negligence Act has proven eminently fair and administratively feasible in Wisconsin for more than 25 years. It has operated particularly well under the Wisconsin special verdict system where a special verdict is mandatory if either of the parties to an action request the same prior to the introduction of any evidence on his behalf (Sec. 270.27 Wis. Stats.). Con-

sequently, we avoid the alleged uncontrolled excesses of a general verdict and the claim that a Comparative Negligence Act may become in actual practice a legal system of liability without fault. Neither of the parties to a negligence action in Wisconsin need any longer be exposed to the uncertainty of a general verdict where the jury decides both the law and the facts and applies its own unscientific system of comparative negligence described by a modern advocate for the retention of the common law doctrine of contributory negligence as follows:<sup>57</sup>

"The average jury has no idea what these instructions (re: negligence with its various degrees, contributory negligence, proximate cause, burden of proof, and last clear chance) really mean, and Judges and lawyers frequently differ among themselves. The result is that juries ignore the legal refinements of instructions and render verdicts based on their own opinions as to 'justice' in the particular case. Juries just do not deny relief to otherwise deserving plaintiffs because of some minor contributory negligence. If the plaintiff's negligence seems significant, there will probably be a compromise verdict—but the average jury will usually award some damages regardless of contributory negligence. Thus in actual practice the American jury has its own system of 'comparative negligence.' "

2. *There should be complete rather than partial acceptance of the Comparative Negligence Theory.* The Wisconsin Comparative Negligence Act does not carry the theory of the Comparative Negligence Law to its logical conclusion. It changes the common law doctrine of contributory negligence only "if such negligence was not as great as the negligence of the person against whom recovery is sought," and any damages allowed must be diminished "in proportion to the amount of negligence attributable to the person recovering." If the claimant's ordinary causal negligence is but slightly less in percentage than that of the person against whom recovery is sought, he can recover over half of his damages. This is not merely academic—it is real.

Thus, in *Froemming v. Amity Leather Products Co.*,<sup>58</sup> involving an automobile negligence action, the jury found the plaintiff-driver of one car was 48% negligent, and the defendant-driver of the other car 52% negligent. Had the plaintiff-driver suffered \$60,000 damages and the defendant-driver \$10,000 damages, under the common law neither one could recover from the other, but under the Wisconsin type of Comparative Negligence Act, the defendant-driver bears his own loss of \$10,000 and is also obligated by judgment to pay the plaintiff-driver the sum of \$31,200 A's entire damages of \$60,000 less 48% thereof, or \$28,800). A very slight difference in percentage of negligence

<sup>57</sup> Lewis F. Powell, Jr. of the Virginia Bar, 43 A.B.A.J. 1005, at 1006 (November 1957).

<sup>58</sup> 274 Wis. 181, 80 N.W. 2d 228 (1956).

found can, therefore, make a great difference in the ultimate judgment.

However, if the principle of comparative negligence is accepted, there is no logical reason why a claimant should not be permitted to recover irrespective of the degree of his negligence, provided his total damages are diminished in proportion to the amount of negligence attributable to him.

Thus, if *A* suffers \$60,000 damages in a negligence case and his percentage of negligence is found to be 48%, and *B* suffers \$10,000 damages and his percentage of negligence is found to be 52%, recovery should be allowed to *A* in the sum of \$31,200 (*A*'s entire damages of \$60,000 less 48% thereof, or \$28,800); recovery should also be allowed *B* in the sum of \$4800 (*B*'s entire damages of \$10,000 less 52% thereof, or \$5200); and the \$4800 judgment awarded *B* should be satisfied of record and a credit of \$4800 applied to the \$31,200 judgment of *A*, who should be entitled to execution for the unpaid \$26,400 balance of his judgment.

As a protection against any unjust judgments in favor of a party guilty of a high percentage of negligence and suffering comparatively high damages against a party guilty of a low percentage of negligence and suffering comparatively low damages we have the complete defense of gross negligence. We also have the trial court's right upon review of motions after verdict to grant a new trial in the interests of justice and the appellate court's right upon appeal to do likewise.

As an additional protection, perhaps the trial court should be permitted to read the Comparative Negligence Statute to the jury. In trials to the court without a jury the court knows of it and is affected consciously or unconsciously by it. In jury trials it will almost always be known as a matter of common knowledge as being the very reason for finding the negligence of the parties in terms of percentages; if not, it is readily deduced from the form of the special verdict and the argument of counsel urging little, if any, percentage of negligence to be found against the client.

The Federal Employers' Liability Act, the Mississippi Comparative Negligence Statute, and the Canadian Acts on comparative negligence have no limitation on claimant's right of recovery based upon whether his contributory negligence was "as great as that of the person from whom recovery is sought." We should have none. The Wisconsin type of Comparative Negligence Act should be amended by deleting therefrom the phrase, "if such negligence was not as great as the negligence of the person against who recovery is sought."

3. *Contribution of tort-feasors should also be governed by the Comparative Negligence Act.* Under the present Wisconsin Comparative Negligence Act persons found guilty of ordinary negligence have

their respective percentages of negligence determined for the purpose of ascertaining whether the separate percentage of negligence of each tort-feasor is as great as the percentage of negligence of the person seeking recovery. The claimant is denied recovery from any tort-feasor whose percentage of causal negligence is less than or equal to his. On the other hand, a defendant-tort-feasor paying a joint and several judgment obtained by a plaintiff, is entitled under the existing Contribution Rule of Equal Proportion, to recover from his co-defendant joint tort-feasors contribution, irrespective of his own percentage of negligence, on an equal basis, except in the case of gross negligence. This is inconsistent and unfair. The reason for the Contribution Rule of Equal Proportion, namely, the seeming difficulty of determining the degree of negligence of each joint tort-feasor, no longer exists, for it is now determined in every case governed by the Comparative Negligence Act. As Judge Learned Hand would say, "This vestigial relic of the law" should now be abandoned.

Why should a defendant joint tort-feasor, found guilty of 1% negligence, be required, pursuant to the Contribution Rule of Equal Proportion, to pay a co-defendant-tort-feasor, found guilty of 99% negligence, the sum of \$30,000, or 50% of a \$60,000 judgment recovered by a plaintiff? By paying the judgment the co-defendant-tort-feasor has satisfied a joint and several judgment for which the law made him fully liable as between himself and the plaintiff. He should be permitted to recover a \$600 judgment against his co-defendant joint tort-feasor found guilty of 1% negligence (his full payment to the plaintiff, namely, \$60,000 diminished by 99% thereof, or \$59,400.) Then, and only then can it be said, as in *Wait v. Pierce*<sup>59</sup> (1926):

"The right of contribution is founded upon principles of equity and natural justice . . . whether the common obligation be imposed by contract or grows out of a tort, the thing that gives rise to the right of contribution is that one of the common obligors has discharged more than his fair equitable share of the common liability."

The need for changing our thinking on the Rule of Contribution was emphasized by the recent decision rendered by the Wisconsin Supreme Court on December 3, 1957, in the case of *Rusch v. Korth*<sup>60</sup> where it was held that the discharge of a "common liability" was not a condition precedent to recovery for contribution. The rule that "the right of contribution is founded upon principles of equity and natural justice" was restated and held paramount to any requirement of a "common liability." The stated rationale therefore was that ". . . if a wrongdoer who has paid a claim may recover one-half the payment

<sup>59</sup> 191 Wis. 202, at 225, 209 N.W. 475, at 484, 210 N.W. 822 (1926).

<sup>60</sup> 2 Wis. 2d 321, \_\_\_\_\_ N.W. \_\_\_\_\_ (1957).

from another who ought in fairness to pay part of it, then one who is found not to have been guilty of any wrong, and who was not a mere volunteer or intermeddler in paying the claim, should not be denied a like recovery from one who ought in equity and fairness to pay the whole claim, notwithstanding that in such latter case there is no 'common liability' as a basis for contribution." Query, if one "in equity and fairness ought to pay the whole claim," isn't something radically wrong with the current Rule of Contribution that requires him to pay only one-half of said claim?

To abolish the inequitable Contribution Rule of Equal Proportion, an amendment should be made to the Comparative Negligence Statute by adding thereto this sentence:

"After discharge of a legal liability which in equity should be the shared responsibility of several persons, recovery for contribution among persons found guilty of concurring ordinary negligence shall be allowed according to the ratio of the percentages of their respective concurring negligence to their combined percentages of concurring negligence."

Should the loss in contribution to defendant joint tort-feasors, resulting from the non-payment by one defendant joint tort-feasor of his proportionate share of contribution, be apportioned to the remaining joint tort-feasors based upon the ratio of their respective percentages of negligence to their combined percentages of negligence? It is very doubtful. Usually collectibility cannot be ascertained until long after entry of the final judgment, which should terminate litigation. The Law of Negligence is not primarily concerned with the collection of a judgment, much less is a Comparative Negligence Act or the proposed Comparative Contribution Amendment thereto.

4. *Gross Negligence Doctrine should remain unaffected by the Comparative Negligence Act.* The Mississippi Statute on comparative negligence and the Federal Employers' Liability Act cover all forms of negligence including gross negligence. If gross negligence is interpreted as meaning only a greater degree of ordinary negligence or a greater want of ordinary care, it may be argued it should be included under the term "negligence" covered by the Comparative Negligence Law. It may also be argued that the abrogation of the Gross Negligence Rule should be made comprehensive so that it applies to contribution between defendant joint tort-feasors as well as to the liability for damages to the plaintiff.

It is believed the abrogation of the Gross Negligence Rule would be a mistake. The Wisconsin Supreme Court has expressly held that ordinary negligence has no sub-degrees such as slight, medium, or great; that ordinary negligence and gross negligence do not grade into each other; that, in fact, gross negligence is a misnomer for a wrong

characterized by an intent to injure, if not actual, then constructive, that is, by such a reckless and wanton disregard of the rights and safety of one or his property, and a willingness to inflict injury as the law deems equivalent to such intent. In short, ordinary negligence is an inadvertent wrong, whereas gross negligence is an intentional wrong.

The legal specialists writing on Negligence in the Restatement of the Law<sup>61</sup> carefully distinguish between negligence based upon mere inadvertence and "reckless disregard of safety," defined as the intentionally doing or failing to do an act which is one's duty to do, knowing or having reason to know of facts which would lead a reasonable man to realize that said conduct not only creates an unreasonable risk of bodily harm to another, but also involves a high degree of probability that substantial harm will result to him. It is firmly believed that this sharp distinction between ordinary negligence and so-called gross negligence should be retained; the reasons therefore are sound and substantial.

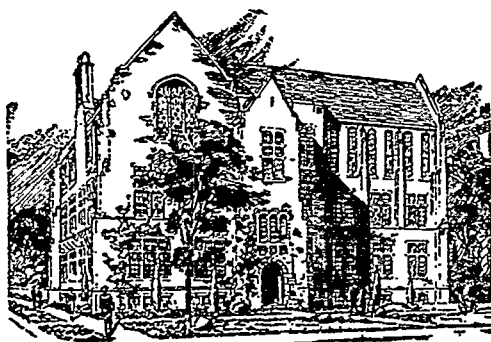
Lastly, as lawyers, we should always be interested in the efficient administration of justice, "Equal Justice Under the Law." If an amended Comparative Negligence Act can reasonably be expected to improve our jurisprudence, we should accept it without hesitation. We should not blindly follow the sterile Principle of Precedent or Stare Decisis by clinging tenaciously to the Common Law Doctrines of Contributory Negligence and Equal Contribution between Joint Tort-feasors. To do so would command the science of jurisprudence to halt in its steady progress and stretch it upon a veritable iron bed of Procrustes. We should bravely lead in the field of legal science, ever mindful of the fact that the law is a living thing, always amendable to reason, the very soul of the law.

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<sup>61</sup> RESTATEMENT, TORTS §500 (1934).



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